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IN THE

Supreme Court of the United States

OCTOBER TERM, 1972

NEW YORK CENTRAL RAILROAD COMPANY,
a Corporation,

Petitioner,

vs.

JO ANN RAINES, as Special Administrator of the Estate of Thomas Raines, Deceased,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

PREFATORY NOTE.

Analysis of the Petition makes manifest the want of reason for its allowance. While it contains broad statements about purported conflicts between the opinion of the Illinois Supreme Court and other courts, it will be demonstrated none exist. The sole issue was the amount of damages due the employee. The trial judge approved the verdict. The intermediate court of review which re-

versed did not find the award to be excessive. Nor did the state Supreme Court. Hence the novel and unprecedented reasons urged are moot.

The Illinois Supreme Court followed the mandate of this court when a claim of excessiveness is made. It made a detailed appraisal of the evidence on this issue to determine whether allowing the jury's award to stand would be a denial of justice. (*Grunenthal* v. *Long Island R.R. Co.*, 393 U.S. 156, 159 (1968).)

The simple question presented here may be framed thus: Is this Court to interfere with the verdict of a properly instructed jury based on competent evidence and not found excessive by the trial court or the two state reviewing courts, solely to decide contentions of petitioner which have already been determined adversely to it in multiple other precedents?

REASONS FOR DENIAL OF THE PETITION.

Petitioner's sketchy factual statement requires an addendum. In the interest of simplicity it should be noted that:

1. The Illinois Supreme Court followed the mandates of this Court;

2. Evidence of the pension was admissible under Federal law as part of the element of future loss of earnings;

3. Evidence of future pay increases as well as rising prices is held admissible by all courts with the exception of the intermediate Illinois Appellate Court, which was reversed by the Illinois Supreme Court; petitioner has given this Court no authority;

4. The question of income taxation is no longer open to dispute.

The only issue in this case was the amount of damages. The verdict of the jury was approved by the trial judge and hence any reviewing court's scope was very limited. Moreover, no court, trial, or review, found the verdict excessive—a circumstance which renders moot petitioner's novel arguments.

Future damages were reduced to present worth. All witnesses, whether for petitioner or respondent, testified in terms of present value.

> "Both the parties introduced testimony to ascertain the present cash value of plaintiff's anticipated future earnings. . . . According to the various witnesses, the evidence was that the present cash value of the plaintiff's future earnings was approximately $185,000 to $225,000." (p. 15a, Pn.)

So also the jury was admittedly properly instructed and directed to reduce to present cash value future earnings.

> ". . . The trial judge instructed the jury that plaintiff was entitled to the 'present cash value of earnings reasonably certain to be lost in the future.' The defendant made no objection to the instruction and does not quarrel with the measure of damages proposition the instruction embodies." (p. 5a, Pn.)

Petitioner has set forth in an Appendix (Exhibit C) portions of testimony but has not advised the Court that that was without objection. Under Illinois law the failure to object precludes questioning the admissibility of the evidence on appeal. *Goldberg* v. *Capital Freight Lines,* 382 Ill. 283. Nor has it advised this Court of its want of complaint in its post-trial motion of the excerpted matter of inflation. (A. 11-20)

An Illinois Statute requires:

> ". . . the post trial motion must contain the points relied upon, particularly specifying the grounds in support thereof. . . . A party may not urge as error on review of the ruling on his post-trial motion any point, ground or relief not particularly specified in the motion." (Sec. 68.1, Ch. 110, Ill. Rev. Stats.) (See *Moore* v. *Jewel Tea,* 116 Ill. App. 2d 109, 119, 120; *Manno* v. *Stein,* 99 Ill. App. 2d 398, 241 N.E. 2d 691; *Perez* v. *B. & O. R. Co.,* 24 Ill. App. 2d 204, 210, 164 N.E. 2d 209, 212.)

The Appellate Court noted:

> "Both parties introduced testimony regarding the most advantageous economic means to compensate plaintiff in damages." (p. 21a, Pn.)

It, itself, introduced evidence of which it complains. The trial judge noted in overruling Respondent's objection to certain evidence offered by Petitioner:

> "Everybody has introduced factors, interest rates, and so on, and fluctuations in markets. Therefore, I am going to permit him to testify as to what it would cost to purchase from the high class company, a policy that would give him $1000.00 per year and take away all the risk." (R. 721)

A party who introduced evidence of the same character cannot complain. (*Supolski* v. *Ferguson & Lange Co.*, 272 Ill. 82, 89.)

A Railroad Retirement Board representative stated that there was fixed by law the monthly annuity that a person would receive who would retire after thirty years. Petitioner would seek to equate rising prices and wages and a pension after thirty years' service with federal income tax. It confuses the fundamental principle of the law of damages to restore the injured party as nearly as possible to the position he would have been in had it not been for the wrong inflicted. Income tax is a matter between the citizen and his government and Congress has given the injured and the tortfeasor certain benefits.

THE ILLINOIS SUPREME COURT FOLLOWED FEDERAL LAW.

There is no question that in an action under the Federal Employers' Liability Act federal law governs. Contrary to petitioner's statement (pp. 3, 4, Pn.) the intermediate state court of review did not follow "the unanimous decisions of all previous cases."

Nor did the Appellate Court, as petitioner represents (pp. 3, 4) follow the "unanimous decisions of all previous cases."

On the contrary it is without precedent and is contrary to federal law and the function of a reviewing court on this question. (*Grunenthal* v. *Long Island R.R. Co.*, 393 U.S. 156, 160; *Taylor* v. *Washington Terminal Co.* (D.C. Cir.) 409 F. 2d 145, 148; *Dagnello* v. *Long Island RR. Co.* (2 Cir.) 289 F. 2d 797, 806.) Instead it relied upon

a 1960 Illinois Appellate Court opinion. (*Smith* v. *Illinois Central R. Co.*, 29 Ill. App. 2d 168, 172 N.E. 2d 803.) (p. 19a, Pn.)

The Illinois Supreme Court is in nowise contrary to any decision of this Court. That court did not accept petitioner's contention that the verdict was the result of passion and prejudice. It found, separate and apart from petitioner's contentions, there was adequate evidence to support the verdict. (pp. 9a-16a, Pn.)

The object of the law of damages is to restore the injured party as nearly as possible to the position he would have been in had it not been for the others wrong. Juries are allowed to act upon probable and inferential as well as direct proof; any other rule would allow the wrongdoer to profit at the victim's expense. (*Bigelow* v. *RKO Radio Pictures*, 327 U.S. 251, 264, 265.)

The reviewing court must give the benefit of every doubt to the trial judge. (*Dagnello* v. *Long Island RR. Co.* 289 F. 2d 797, 806 (2 Cir.); *Taylor* v. *Washington Terminal Co.*, (D.C. Cir.) 409 F. 2d 145, 148.) Only where the trial judge has abused his discretion in finding "nothing untoward, inordinate, unreasonable or outrageous" about the verdict will the court of review interfere. (*Gruenthal* v. *Long Island RR. Co.*, 393 U.S. 156, 160.)

So also the likelihood of future pay increases or inflation is an established factor. (*Gruenthal* v. *Long Island RR. Co.*, 393 U.S. 156, 160.) This is recognized by all authorities on the law of damages.

THE OPINION OF THE ILLINOIS SUPREME COURT IN ALLOWING EVIDENCE OF A PENSION FIXED BY LAW UNDER THE RAILROAD RETIREMENT ACT IS NOT CONTRARY TO THE DECISION OF ANY COURT.

Petitioner urges that a series of cases including *Eichel* v. *New York Central R. Co.*, 275 U.S. 253 (1960), as well as others are contrary to the opinion of the Illinois Supreme Court. In each of those cases the benefits received under the Railroad Retirement Act were relied upon either to show plaintiff's failure to return to work due to malingering or to mitigate damages. As the Illinois Supreme Court opinion succinctly states:

> "The authorities offered by the defendant to support the appellate court's view did not involve the issue we consider. In *Eichel* v. *New York Central R.R. Co.*, 375 U.S. 253, 11 L. Ed. 2d 307, 84 S. Ct. 316, which was relied on by the appellate court, the Supreme Court held that the trial court properly excluded evidence that the plaintiff was receiving a disability payment of $190 per month. The decision does not have force here, however, for the evidence had been offered by the defendant to show that the plaintiff's failure to return to work was due to malingering. The other cases advanced by the defendant (*Sinovich* v. *Erie R.R. Co.* (3rd cir. 1956), 230 F. 2d 658; *Hetrick* v. *The Reading Company* (D.C. N.J. 1941), 39 F. Supp. 22; *Riley* v. *West Virginia Northern R. Co.* (1948), 132 W. Va. 208, 51 S.E. 2d 119; *Missouri Pacific R.R. Co.* v. *Wellingham* (Tex. Civ. App. 1961), 348 S.W. 2d 764; *Gilroy* v. *Erie-Lackawanna R.R. Co.* (S.D. N.Y. 1968), 279 F. Supp. 139; and *New York, New Haven & Hartford R. Co.* v. *Leary* (1st cir. 1953), 204 F. 2d 461) are to the effect that a defendant may not mitigate damages by introducing evi-

dence of the plaintiff's pension rights. They are not relevant here."

"Raines offered the evidence of his lost pension rights in proof of the injury inflicted on his future earning capacity." (p. 5a, Pn.)

That one must have ten years of service to qualify for the benefits of the Railroad Retirement Act does not affect the admissibility of such evidence but goes only to its weight. Under petitioner's contention a person would have to actually obtain the pension to have it regarded as part of his damages. Here, the pension rights provided by the Railroad Retirement Act are certain; they are determined by law. (A. 145, 146)

That the Railroad Retirement Act has pension provisions cannot be denied. (45 USC Sec. 228a *et seq.*) Nor would the admission of the loss of future pension benefits amount to a duplication of future lost wages. The Illinois Supreme Court specifically held this observation to be erroneous. (p. 7a, Pn.) It is patent that Raines could not be receiving a pension at the same time he was working for the railroad. If one worked until he became eligible for retirement in the railroad industry, took his retirement and thereafter pursued other work, he could recover whatever damages would be sustained as a result of (a) his inability to work; (b) to work until he received a pension, and (c) to then do whatever he thereafter desired. (*Boston & Maine Ry. Co.* v. *Talbert*, 360 F. 2d 286, 291 (1 Cir. 1966).)

Petitioner seeks to gloss over the *Boston & Maine Ry. Co.* decision (*Boston & Maine Ry. Co.* v. *Talbert*, 360 F. 2d 286, 291) with the gratuitous statement that "no one objected to their admissibility." (p. 9, Pn.)

In that death action under the Federal Employers' Liability Act, we find:

> "At the time of his death Talbert was earning $9237 per year and had a life expectancy of 24.6 years. At age sixty-five, he would have retired with a pension of $287 per month for the rest of his life and could have supplemented this amount by other employment." (p. 291)

The pension involved was the Railroad Retirement Pension. As if that were not enough, the question both in the trial court and on appeal as to whether the contributions of the defendant toward a railroad pension could be shown. That this issue was contested is apparent:

> "The evidence of Talbert's income taxes and railroad retirement contributions here was properly excluded . . ." (*Boston & Maine Ry. Co.* v. *Talbert*, 360 F. 2d 286, 291.)

Loss of pension rights is in the same category as loss of future earnings. They are recognized in both state and federal courts. (See *Cunningham* v. *Rederiet Vindeggen A/S*, (2 Cir. 1964) 333 F. 2d 308; *Healy* v. *Rennert* (1961), 9 N.Y. 2d 202, 213 N.Y.S. 44, 173 N.E. 2d 777; *Groat* v. *Walkup Drayage and Warehouse Co.*, (1936), 14 Cal. App. 2d 350, 58 P. 2d 200; *Gatenby* v. *Altoona Aviation Corp.*, 277 F. Supp. 1011 (1968); *Wands* v. *Cauble*, 154 S.E. 2d 425; *Nollenberger* v. *United Air Lines, Inc.*, 211 F. Supp. 734 (1963). The question of admissibility of pension income is frequently found in death cases. (See 81 A.L.R. 2d 950).

THERE IS NO CONFLICT BETWEEN STATE AND CIRCUIT COURTS OF APPEAL AS TO WHETHER A JURY SHOULD BE PERMITTED TO CONSIDER THE ELEMENT OF FEDERAL INCOME TAX IN AWARDING DAMAGES.

Petitioner sought to have the jury instructed that the award would not be subject to income tax. "As to the remaining issue of failing to instruct the jury that the award would not be subject to income tax, we say that such an instruction is not proper." (p. 27a, Pn.)

This is the narrow scope of the broad question of Federal income taxation. The Illinois Supreme Court in the F.E.L.A. case of *Hall* v. *Chicago and Northwestern R. Co.*, 5 Ill. 2d 135, 151, 152, 125 N.E. 2d 77 (1955), held that this was immaterial because: (a) what the plaintiff does with the award and how the defendant acquires it is of no concern to the jury; (b) this is a matter between the plaintiff and his government; and (c) if damages were to be mitigated by the income tax exemption then the Congressional intent to give the injured party a tax benefit will be nullified.

Again here is the problem of deductions. As *McWeeney* (*McWeeney* v. *New York, N.H. & H. RR. Co.*, (2 Cir.) 282 F. 2d 34) points out, are the procreative proclivities and potentialities of the individual and his spouse to be considered? Nor is the tortfeasor to be allowed this benefit. If Congress intended to allow the wrongdoer the income tax deduction, it must be presumed it would have said so, since this question first arose in 1944. (*Stokes* v. *United States*, (2 Cir.) 144 F. 2d 82.)

Petitioner's contention has been almost universally rejected. The Circuit courts have uniformly excluded this element in computing damages in actions under the Fed-

eral Employers' Liability Act. (*Boston and Maine RR. Co.* v. *Talbert*, 1 Cir., 360 F. 2d 286; *McWeeney* v. *New York, N.H. & H. RR. Co.*, 2 Cir., 282 F. 2d 34; *Payne* v. *Baltimore and Ohio RR. Co.*, 309 F. 2d 546; *Curl* v. *Chicago and Northwestern R. Co.*, 178 F. 2d 497.)

This element has not only been excluded in actions under the Death on the High Seas Act, (*Petition of Marina Mercante Nicaraguense, S.A.*, (2 Cir.) 364 F. 2d 118; *Noel* v. *United Aircraft Corporation*, 3 Cir., 359 F. 2d 671; *National Airlines, Inc.* v. *Stiles*, 5 Cir., 224 F. 2d 5; *Stokes* v. *United States*, 2 Cir., 144 F. 2d 82, 87.), but it has been held reversible error to consider income taxation. (*Petition of Marina Mercante Nicaraguense, S.A.*, 2 Cir., 364 F. 2d 118, 125; *Noel* v. *United Aircraft Corporation*, 359 F. 2d 671.)

Death on the High Seas Act provides the same remedy as the Federal Employers' Liability Act. (45 U.S.C.A. Sec. 51 *et seq.*; *Van Beeck* v. *Sabine Towing Co.*, 300 U.S. 342, 343.)

State Supreme courts have almost uniformly refused to instruct on this element. (For an exhaustive collection see 63 A.L.R. 2d, pp. 1394 *et seq.*, as well as the Later Case Service.)

O'Connor v. *United States*, 269 F. 2d 578 (C.A. 2, 1959), cited by petitioner was a federal tort claim action determined by the law of Oklahoma and specifically rejected by the same court in *McWeeney* v. *New York N.H. & H. RR.*, 282 F. 2d 34, 39.

Cox v. *Northwest Airlines, Inc.*, 379 F. 2d 893, did not involve a jury instruction. It referred to the repudidated *O'Connor* decision (*O'Connor* v. *United States*, 269 F. 2d

578 (C.A. 2, 1959). Moreover, each of these cases has not been followed in the respective circuits.

Domeracki v. *Humble Oil & Refining Co.*, 443 F. 2d 1245, 1251, announced a rule to have perspective operation. There was requested an instruction different from the one here on the question of federal income taxation (pp. 1248, 1249). It was refused and the judgment was affirmed. A single opinion announcing a perspective operation is not ground for this Court's review.

THERE IS NO DIVISION OF AUTHORITY AS TO WHETHER INFLATION MAY BE CONSIDERED IN DETERMINING THE AMOUNT OF DAMAGES TO BE AWARDED IN F.E.L.A. CASES.

Inflation in itself is not an element of damages. Rather it is a part of the future damages which will be sustained from inability to work. Nor is there any division of authority. The cases cited by petitioner are not relevant. They announce the principle that future damages must be reduced to present value. (*Petition of United States Steel Corp.*, 436 F. 2d 1256; *Williams* v. *United States*, 435 F. 2d 804, 807 (C.A. 1, 1970); *Sleeman* v. *Chesapeake & Ohio Ry. Co.*, 414 F. 2d 305, 308 (C.A. 6, 1969).)

That *Sleeman* was reversed solely on this ground is obvious from a subsequent opinion of the same Circuit.

> "Additionally, we observe that the discussion in *Sleeman* of the consideration of current economic trends in awarding future damages was dictum inasmuch as reversal resulted from the failure of the District Court to reduce future damages to their present worth." (*Willmore* v. *Hertz Corporation*, (6 C.A.) 437 F. 2d 357 (1971).)

We have seen that future damages were reduced to present value here. (pp. 15a, 5a, Pn.)

Murphy v. *Eaton, Yale & Towne, Inc.*, 444 F. 2d 317, 328 (C.A. 6, 1971), involved a multitude of errors, the least of which was an instruction which erroneously undertook to define the element of damages. Petitioner cited no case which supports its petition that economic changes are not relevant, but see 22 Am. Jur. 2d, par. 87, page 125, entitled "Change in cost of living or in purchasing power of money."

Here the evidence complained of was an economist's testimony that based upon the past history of increases for railroad workers, it was his opinion that increases would continue and that prices would rise. (p. 7a, Pn.) He did not undertake to state the particular increases (A. 145) but this was left to the jury.

The other authorities portrayed as representing "the opposite view" (p. 13, Pn.) do not touch upon the question of failure to reduce to present value future loss of earnings but on the contrary state that, inflation is a matter to be considered.

Inflation is nothing more than higher prices and higher wages. That changes in the purchasing power of money are a proper subject matter for the argument of counsel is well established. (12 A.L.R. 2d 638; *Waiswila* v. *Illinois Cent. R. Co.*, 220 Ill. App. 113, an action under the Federal Employers' Liability Act.)

So also instructions on economic changes have had judicial approbation.

In *Cunningham* v. *Bay Drilling Company,* (5 Cir.) 421 F. 2d 1398, an action under the Jones Act, which incorporates the Federal Employers' Liability Act, the instruction complained of, footnoted on page 1399, was:

> "It is now well recognized that the decreased purchasing power of the dollar, due to rise in living expenses, is a proper element for consideration in determining the amount of award in a tort action. Courts take judicial notice of that fact."

(See also *New Amsterdam Casualty Co.* v. *Soileau,* 5 Cir., 167 F. 2d 767; *Burlington Transp. Co.* v. *Stoltz,* 10 Cir., 191 F. 2d 915; *Chadel* v. *Spira,* 303 P. 2d 879; *Normand* v. *Thomas Theatre Corp.,* 349 Mich. 50, 84 N.W. 2d 451; *Garrett* v. *Taylor,* 69 Idaho 487, 210 P. 2d 836; *Moore* v. *Public Service Coordinated Transport,* 15 N.J. Super, 499, 83 A. 2d 725; *Willmore* v. *Hertz Corporation,* (6 C.A.) 437 F. 2d 357 (1971); *Bearden* v. *LeMaster,* 226 So. 2d 647), as well as on special interrogatories on this subject. (*Nollenberger* v. *United Air Lines, Inc.,* 216 F. Supp. 734.)

Likewise this matter is the subject of expert testimony. (*Har-Pen Truck Lines, Inc.* v. *Mills,* 5 Cir., 1967, 378 F. 2d 705; *Krohmer* v. *Dahl,* (Mont. 1965), 402 P. 2d 970; *Port O'Call* v. *Borris,* 206 So. 2d 241, (Fla. App. 1968); *Complete Auto Transit, Inc.* v. *Reese,* 425 P. 2d 465 (Okla. 1967); *Diener* v. *White Consolidated Industries, Inc.* (Ohio App.) 239 N.E. 421; *Schmitt* v. *Jenkins Truck Lines, Inc.,* 170 N.W. 2d 632; *Schuler* v. *Berger,* (E.D. Pa.) 275 F. Supp. 120, 121 (1967).)

Although here the evidence complained of was that wages of railroad workers would continue to rise, as well

as prices, there was no instruction on the subject. Certainly if this is a matter of which courts take judicial notice, which counsel may argue to the jury and the subject of jury instructions, how can it be said to be improper to introduce evidence upon it? Petitioner has no authority of such impropriety.

CONCLUSION.

Petitioner submitted this cause to the jury solely on the issue of damages. The jury returned a verdict not to its liking. Notwithstanding that the verdict had the approval of the trial court and that neither the intermediate appellate court nor the Illinois Supreme Court, which followed the mandate of this court in *Grunenthal v. Long Island Ry. Co.*, 393 U.S. 156, found the amount awarded to be excessive, it seeks here to carve out new patterns in the law of damages.

The Petition for Writ of Certiorari ought to be denied.

Respectfully submitted,

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